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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HEWLETT-PACKARD COMPANY,

Petitioner,

v.

DATAGATE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent's Brief in Opposition ("Opp." or "Opposition") highlights the importance of granting certiorari in this case to resolve important issues of tying law under Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondent Datagate, Inc. ("Datagate") does not quarrel with the importance of the three questions presented in the petition. Nor does Datagate dispute that

a. the district court found probative record evidence of only a "single incident" involving a "single purchaser" acquiescing in the alleged tying conduct of petitioner Hewlett-Packard Company ("HP");

b. the court of appeals accepted that finding but deemed it sufficient to support a *per se* tying violation;

c. the court of appeals was able to do so only by treating this Court's "single purchaser" statement in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 16 (1984), as a mere restatement of the "substantial volume of commerce" element of a *per se* tying violation, having no substantive or independent meaning;

d. the court of appeals held the "concerted action" element of a Section 1 tying claim satisfied by a showing that the purchaser acquiesced in the purchase of the tied product, despite this Court's holding in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984), that mere acquiescence of one party in the unilateral demand of another cannot suffice for this purpose;

e. the one incident that the court of appeals held sufficient to require a jury trial on Datagate's *per se* claim could not conceivably have affected competition, and its prosecution could not conceivably serve the purpose of antitrust law; and

f. the *per se* rule as applied in this manner chills conduct that may be procompetitive by imposing treble-damage liability without even asking whether there has been an anticompetitive effect or whether there was a legitimate business or efficiency justification for the conduct at issue.

1. ***Reconsideration of Per Se Rule.*** Datagate asserts that this case "would provide a poor factual context for" reconsideration of the *per se* rule because it "is based on the Ninth Circuit's reversal of a summary judgment." Opp. at 18. More specifically, Datagate contends there is no record evidence concerning either the competitive effects or the procompetitive aspects of the alleged tying arrangement. *Id.*

The state of the record in this case, however, supports the grant of the petition. Unlike *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 486 (1992), which involved a "sparse" summary judgment record uninformed by significant discovery, this case comes to the Court after 10 years of litigation on a completed summary judgment record. Unlike the plaintiff in *Kodak*, Datagate does not dispute that it was afforded "full discovery" (Pet. at 2) on its tying claim.[1] After such full discovery, Datagate was able to proffer only one admissible incident to support its allegation that HP tied software and hardware service.[2] In short, the record is adequate to address *all*

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[1] Datagate observes that the district court had dismissed its original tying claim pursuant to Fed. R. Civ. P. 12(b)(6) without allowing discovery on it. Opp. at 5. Datagate, however, does not dispute that it took full discovery on its tying claim following the reversal of that holding.

[2] Datagate contends that it "had evidence of numerous other specific tie-ins" but admits that "this evidence was ultimately (continued...)

of the questions presented, including the continued appropriateness of the *per se* rule. Neither further discovery nor a trial would provide any additional information relevant to these questions.

Datagate's observation (Opp. at 18) that there is no record evidence concerning competitive effects and procompetitive justifications simply proves HP's point. The whole purpose of the *per se* rule is to obviate such inquiries into competitive effects and procompetitive justifications. Thus, none of the evidence that Datagate claims is missing is relevant to a *per se* tying claim. Indeed, Datagate would object to such evidence as irrelevant. There is accordingly no reason to wait for any proffer of such evidence before deciding whether, as a matter of law, the *per se* rule should be abandoned.

While such evidence would be critical to any rule of reason tying claim, Datagate does not dispute that it "never attempted to establish a rule of reason tying offense." Pet. at 6 n.3. Accordingly, abandonment of the *per se* rule would be dispositive of this case.[3]

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[2] (...continued)
excluded as being hearsay." Opp. at 3. Datagate does not challenge the exclusion of the hearsay evidence.

[3] Datagate contends that "the tie-in imposed by HP had absolutely no procompetitive justification, and HP made no attempt to offer such a justification before the trial court." Opp. at 18. Since Datagate proceeded only under a *per se* theory, where procompetitive justifications are irrelevant, HP had no occasion to argue procompetitive justifications for the alleged tie. In any event, Datagate does not dispute HP's showing (Pet. at 29) that tying arrangements *can* have procompetitive effects, which is the relevant question in deciding whether to retain the *per se* rule.

2. ***Anticompetitiveness of Per Se Rule.*** In *Jefferson Parish*, neither the majority nor the minority questioned that tying can be procompetitive. The majority who retained the *per se* rule 12 years ago recognized that "not every refusal to sell two products separately can be said to restrain competition" and that "[b]uyers often find package sales attractive." 466 U.S. at 11-12. Datagate intimates that *Kodak* thereafter somehow settled the question whether the *per se* rule should be retained. Opp. at 18. In *Kodak*, however, this Court was not asked to and did not answer that question. As Judge Easterbrook recently observed, "Kodak did not undercut Hyde." *Digital Equip. Corp. v. Uniq Digital Technologies, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,260 at 76,138 (7th Cir. Jan. 16, 1996). The Seventh Circuit stated in *Digital Equipment* that the asserted tie between computer hardware and operating system software there at issue was procompetitive. *Id.* at 76,136 ("[C]ompetition is more vital, and consumers are better off, when it is possible to sell entire functioning units in boxes."). Plainly, tying arrangements can often be procompetitive and therefore should not be subject to *per se* treatment, particularly where the rule of reason continues to be available to remedy any anticompetitive ties.

Although the Seventh Circuit ultimately affirmed the pretrial dismissal of the tying claim in *Digital Equipment*, that case exemplifies the dangers of the *per se* rule. According to the Seventh Circuit, *Digital Equipment* was "a mundane commercial case" dressed up in federal antitrust garb. *Id.* at 76,138. Similarly, lured by the prospect of a treble damage award, Datagate has disguised what is at best a state tort claim as a federal antitrust suit. This is an apt illustration of how the *per se* rule proliferates inappropriate uses of the federal courts, at the same time chilling sellers from adopting entirely procompetitive arrangements for fear that they will be subject to treble damage liability. Review is necessary to reconsider this anticompetitive rule.

3. ***Multiple-Purchaser Requirement.*** The petition seeks review to clarify the statement in *Jefferson Parish*, 466 U.S. at 16, that "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." Datagate contends that this multiple-purchaser condition that this Court required for the imposition of liability "would serve no logical purpose *not already served* by the 'substantial volume'" requirement of the *per se* tying offense. Opp. at 15 (emphasis in original).

To the contrary, the multiple-purchaser requirement fills a gaping hole left by the volume of commerce requirement, namely, the need to show that the alleged tie had an impact on *competition generally*. This case dramatically illustrates the point. The alleged tie affected an infinitesimal portion of the market and therefore posed no conceivable threat to competition.[4] Yet the court below found that *per se* liability could attach simply because the Rockwell contract at issue involved a not insubstantial number of dollars.

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[4] Datagate quibbles with HP's estimation that the Rockwell contract, which is the only alleged tying incident at issue in this case, represented about 0.015% of the purported tied product market by saying that HP included all HP hardware service, rather than just minicomputer hardware service, in its calculations. Opp. at 15 n.7. However, Datagate pleaded that the tied product market was for "service and repair of HP hardware systems." Second Amended Complaint ¶ 55. Moreover, HP's estimation of the size of the alleged tied product market was taken from Datagate's own estimation of the size of that market as stated in Datagate's brief to the Ninth Circuit in its first appeal in this case. *See* Pet. at 4-5 n.2. In any event, Datagate does not dispute that, however the tied product market is defined, the Rockwell contract constituted an infinitesimal portion of it.

The *per se* rule "focuses on the probability of anticompetitive consequences. . . . [A]s a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation." *Jefferson Parish*, 466 U.S. at 16. As this case demonstrates, while raising the specter of *per se* liability, the volume of commerce requirement alone does not ensure the necessary "substantial potential for impact on competition." A multiple-purchaser requirement of the sort articulated in *Jefferson Parish* is also required.[5]

In an effort to ward off inquiry into the multiple-purchaser requirement, Datagate now asserts that there were two different Rockwell contracts subject to the alleged tying arrangement. *See* Opp. at 3-4. This is the first time in the 10 years since this action began that Datagate has taken such a position. Datagate's new factual proffer is irrelevant since *Jefferson Parish* requires multiple *purchasers*, not merely multiple contracts of the same purchaser, to be subjected to the alleged tie.

In any event, Datagate's new factual proffer finds no record support. There is no record evidence that more than one

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[5] Datagate contends that there is no conflict among the circuits by asserting that, in *Gonzalez v. St. Margaret's Housing Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989), and *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215 (8th Cir. 1987), there was "bare repetition of the relevant language from *Jefferson Parish*." Opp. at 16, 17. Such so-called "bare repetition" *confirms* that the Second and Eighth Circuits accepted the existence of a multiple-purchaser requirement. The court below squarely rejected that requirement. But for that rejection, the Ninth Circuit could not have breathed new life into this ancient case. Thus, the decision below creates a direct conflict among the circuits, requiring this Court's resolution, as to the meaning of the single-purchaser statement in *Jefferson Parish*.

Rockwell contract was at issue. The only support Datagate cites for the new proffer is the hearsay declaration of its president. That declaration refers only to a single contract and does not, as Datagate now contends, mention separate contracts for HP 3000 and HP 1000 series minicomputers. Appellant's Excerpts of Record (submitted to the Ninth Circuit) at 168.[6]

Datagate never argued to the court below that there were in fact multiple contracts. Instead, it admitted that there was only one contract at issue. *See, e.g.*, Plaintiff-Appellant's Brief at 8 (setting forth "Datagate's perspective on the Rockwell International *contract* that was lost to HP because of HP's tying arrangement"; emphasis added), 14 (noting "Datagate's evidence of a single tying arrangement"), *Datagate, Inc. v. Hewlett-Packard Co.*, No. 93-17276 (9th Cir. dated March 18, 1993). Datagate cannot raise a new factual matter before this Court that it failed to raise in either the district court or the court of appeals. *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 486 n.3 (1986); *see also New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970).

4. ***Concerted-Action Requirement.*** The petition presents the question whether there is the requisite "concerted action" under Section 1 if the seller unilaterally says to a purchaser that it will not sell the tying product unless the purchaser also buys the tied product, followed by the purchaser's purchase of the tied product. Datagate does not dispute the need to show concerted action, but

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[6] Datagate sprinkles miscellaneous assertions in its Opposition that Rockwell was "unhappy" with HP's performance, preferred Datagate's "superior" service, and was thus forced to accept HP's "unsatisfactory" and "lower quality" service as a result of the alleged tying in this case. Opp. at 4, 8, 10, 16, 19. HP disputes that the record supports Datagate's assertions, but in any event those assertions are irrelevant to the questions presented by the petition.

asserts that evidence that HP allegedly coerced Rockwell into purchasing hardware service from HP satisfies the concerted action requirement. Opp. at 10-12.[7]

Datagate has improperly conflated the concerted-action and coercion elements of the tying offense. The two are independent requirements, but Datagate treats them as if they were one. In *Monsanto*, 465 U.S. at 764, this Court held that mere acquiescence by one party in the unilateral demand of another is insufficient as a matter of law to show concerted action, thus making clear that "forcing" or "coercion" of the sort alleged by Datagate is not the concerted action required by Section 1.[8]

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[7] Datagate asserts that, "[d]uring the entire history of this litigation, HP has never attempted to offer evidence that these conversations with Rockwell did not take place or that they were misinterpreted by Rockwell. Nor has HP ever offered evidence that its employees had been mistaken about HP's policies." Opp. at 5. This is specious. It was entirely unnecessary for HP to put forward its side of the case when it could demonstrate a fatal defect in Datagate's claim. In any event, HP has in fact vigorously disputed that its employees made tying representations and has put Datagate on notice about its position. *See, e.g.*, Memorandum of Points and Authorities in Support of Hewlett-Packard Company's Motion for Summary Judgment Dismissing Tie-In Claim at 8 ("Mr. Buckner's deposition established that . . . *no* such tying condition existed."), *Datagate, Inc. v. Hewlett-Packard Co.*, No C86-20018-RPA (N.D. Cal. filed May 25, 1993) (emphasis in original).

[8] Datagate relies on *Kodak*, 504 U.S. at 463 n.8, to say that evidence of forcing or coercion is sufficient to show concerted action. Opp. at 11-12. As shown in the petition, however, Kodak had entered into written contracts with its equipment owners that expressly stated that Kodak would sell parts only to users who did

(continued...)

5. *Circuit Conflict on Concerted-Action Requirement.* The petition noted the conflict between the decision below and two other appellate decisions, *Service & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680 (4th Cir. 1992), and *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir.), *cert. denied*, 506 U.S. 851 (1992). Datagate asserts that there was no evidence of coercion in *Service & Training*, allegedly unlike here. Opp. at 10. But the existence of coercion was considered irrelevant in *Service & Training* because the basis of the Fourth Circuit's holding was plaintiffs' failure "to raise a genuine issue of fact as to the existence of an antitrust conspiracy between Data General and its CMO customers." 963 F.2d at 686.

Datagate attempts to distinguish *City of Chanute* by saying that the Tenth Circuit did not hold that a unilaterally imposed tie could not constitute concerted action. *See* Opp. at 10-11. As one district court recently stated in an opinion issued after the filing of the petition in this case, however, the "established rule" of *City of Chanute* is that "a unilaterally imposed tie does not satisfy the concerted activity requirement of § 1 of the Sherman Act." *In re Wang Labs., Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,288 at 76,312 (D. Mass. Jan. 4, 1996). Thus, there is a clear conflict between the decision below and both *Service & Training* and *City of Chanute*.

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[8] (...continued)
not use third parties for service, thus establishing concerted action. Pet. at 12 n.6. Datagate does not dispute the absence of any such language in HP's contracts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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